



Agenda Date: 08/06/03
Agenda Item: 3A

STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
www.bpu.state.nj.us

OFFICE OF CABLE
TELEVISION

IN THE MATTER OF THE PETITION OF)	ORDER ADOPTING IN PART,
COMCAST CABLEVISION OF JERSEY CITY, INC.)	REJECTING IN PART
FOR ACCESS TO CERTAIN PREMISES KNOWN)	AND MODIFYING IN PART
"NEWPORT" IN THE CITY OF JERSEY CITY)	INITIAL DECISION

BPU DOCKET NO. CE01090585
OAL DOCKET NO. CTV9687-01

(SEE ATTACHED SERVICE LIST)

BY THE BOARD:

The New Jersey Board of Public Utilities (Board) and its Office of Cable Television (OCTV), pursuant to N.J.S.A. 48:5A-1 et seq., have been granted general supervision and regulation of and jurisdiction and control over all cable television systems which operate within the State of New Jersey, subject only to the limitations of federal law. Pursuant to this authority, the within matter was opened to the Board upon the filing of a petition by Comcast Cablevision of New Jersey, Inc. (Comcast) for access to the Newport Building Complex (Newport Complex) in Jersey City, New Jersey, as authorized by N.J.S.A. 48:5A-49. The Board must now take action on the Initial Decision rendered by Administrative Law Judge (ALJ) William Gural, filed with the Board on June 27, 2003.

This matter centers on the attempt by Comcast to gain access to the Newport Complex to provide cable television service. Prior to this attempt, in 1988, Comcast's predecessor, Cable TV of Jersey City, Inc., sought access to the Newport Complex as well. In that matter, decided by the Board in Docket No. CE88010246, NADC and Cable TV of Jersey City, Inc. had reached a voluntary agreement on all issues except for the question of requiring the cable operator to obtain environmental hazard liability insurance as a condition of access. The Board found that the requirement was reasonable, and ordered the environmental hazard liability insurance as a condition of access. Comcast's predecessor, and later Comcast itself, declined to pursue access to the Newport Complex, citing the high cost of the required environmental hazard liability insurance, and the Board at the time lacked sufficient basis for ordering Comcast to service a complex where no active requests for service existed. Further, Comcast maintained that unregulated cable television service rates would increase in Jersey City substantially if it

were forced to extend service to Newport Complex residents who were already receiving comparable multi channel video service from Liberty Cable, the predecessor to RCN.

Newport Complex is currently served by an established video system¹, owned and operated by RCN Telecom Services, Inc. (RCN). NADC has received a revenue stream from this provision of service for the last fifteen (15) years, dating back to a time before Comcast provided any service to the Newport area. Following receipt by the Board of a petition signed by residents of the Newport Complex seeking access to Comcast's service in the buildings, this matter was initiated. The OCTV took an active role, facilitated negotiations, and, when negotiations failed, directed Comcast to file a petition for access. This petition was filed on September 21, 2001, and NADC filed its answer on October 15, 2001. Following a necessary perfection of the petition, the matter was transmitted to the Office of Administrative Law as a contested matter under N.J.A.C. 14:17-9.1 et seq.

Following transmittal, RCN sought and received intervenor status. After motion practice and a number of delays, ALJ William Gural conducted evidentiary hearings over the course of two days, which addressed the question of compensation for the takings and other technical issues regarding access. ALJ Gural filed his Initial Decision with the Board on June 27, 2003, and exceptions were filed by Comcast, NADC and RCN on July 10 and 11, 2003. Reply exceptions were due on July 17, 2003, but at the request of the attorney for Comcast, an extension was provisionally granted until July 24, 2003, which is now HEREBY GRANTED, nunc pro tunc, by the Board. The parties submitted their reply to exceptions on July 24, 2003.

Access:

While none of the parties associated with this matter opposes the granting of access to the Newport Complex to Comcast, the terms of that access and the questions of compensation form the basis of this contested matter. Accordingly, the Board shall review and discuss each of the issues decided by ALJ Gural and addressed by the parties in their exceptions and reply to exceptions.

ALJ Gural found that NADC's refusal to permit Comcast to serve its tenants is a violation of N.J.S.A. 48:5A-49. ALJ Gural found that Comcast has a valid franchise for the Jersey City area and is both obliged and entitled to access the premises controlled by NADC to provide service to the buildings' tenants. Neither NADC nor Comcast disputes this finding. RCN, however, claims that Comcast should not be granted access to the Newport Complex until the Board's outstanding Order requiring RCN to seek municipal consent and a certificate of approval has either been fully adjudicated. The Board, however, has explicitly rejected this contention in the ongoing RCN matter, Docket No. CC03010023, and need not reiterate the argument here. Accordingly, the Board HEREBY ADOPTS the ALJ's recommendation and HEREBY FINDS AND ORDERS that Comcast has a right to access the Newport Complex, controlled by NADC, subject to the statutorily-required "reasonable conditions necessary to protect the safety, functioning, appearance and value of the premises and the convenience, safety and well-being of other tenants" addressed below. See N.J.S.A. 48:5A-49.

¹ Although the RCN system in Newport was initially established and operated as a Satellite Master Antenna Television (SMATV) system, the Board, by Order dated April 29, 2003, in Docket No. CC03010023, found that RCN's video system, by virtue of its use of the public right-of-way, is a cable system and directed RCN to file a petition for a Certificate of Approval. RCN's Motion for reconsideration was denied by Board Order dated June 20, 2003.

Valuation:

ALJ Gural determined that the proper compensation for the taking of property associated with the installation of cable wires and equipment was the \$1.00 offered by Comcast under N.J.A.C. 14:18-4.5(a). ALJ Gural specifically declined to accept the valuation of \$1.5 million presented by NADC based upon a “cost of service basis,” finding the valuation “improper” and that the approach failed to comply with N.J.A.C. 14:18-4.6(d)(1-2). Specifically, he noted that, when an owner sought “just compensation” from the Board under N.J.A.C. 14:18-4.5, above and beyond the default payment of \$1.00, the owner carried the burden of showing the value of the applicant’s property both before and after the installation of cable television facilities, with the compensation being the diminution in value. ALJ Gural found that the witness for NADC failed to provide these “before and after” values such that a determination of any diminution could not be calculated.

Comcast has no objection to this determination, and seeks the Board’s adoption of the finding. NADC takes exception to this finding, claiming that the ALJ’s determination is “solely based on a hypertechnical and overly narrow interpretation and application of a Board rule.” (NADC Exceptions to Initial Decision, at 27 (hereinafter, NADC Exceptions).) NADC’s expert testified that the taking occasioned by the cable access proposal entails the loss of an economic portion of property in the form of a cessation of the revenue stream NADC receives from RCN. The expert arrived at this \$1.5 million figure by taking the projected future income stream on an annual basis and utilizing an increase of 3% per year, and then adjusting for a present value discounted cash flow. NADC claims that, as the only evidence presented on valuation, the ALJ was required to accept the argument presented, and likewise discusses the need for the entity taking the property, and not the owner, to seek any required appraisals. Accordingly, NADC objects to the entire just compensation calculation.

The Board finds the determination of the ALJ to be persuasive and appropriate on this topic. N.J.A.C. 14:18-4.5 provides that the owner of property being taken by a cable company has the burden of proof to clearly demonstrate any just compensation calculation that deviates from the default of \$1.00. NADC did not carry this burden and thus the Board is not bound by the testimony of NADC’s witness. The Board concurs with ALJ Gural’s determination that the “cost of service basis” presented by NADC is improper. N.J.A.C. 14:18-4.5(d)(1-2) requires that just compensation determinations be based upon a comparison of the value of the property before the takings versus the value of the property after the takings. ALJ Gural was correct in noting that NADC did not satisfy this requirement. NADC’s own witness, a real estate appraiser, found that there would be no difference in the value of NADC’s real property caused by Comcast’s taking. Specifically, he found that “[t]he land and building structures will remain essentially the same after the taking due to the cable access proposal (with the exception of the physical presence of wiring and equipment and any repairs and/or renovations required to accommodate Comcast’s wiring and equipment), as they were in the before condition.” (Sussman Testimony, (Newport-17), 3:21-25.) Additionally, even if this approach to valuation was acceptable, NADC is, in effect, seeking to be compensated for the loss of income based upon RCN being subject to competition with its current television system. As noted by the Appellate Division, this is not a compensable loss. NYT Cable TV v. Homestead at Mansfield, Inc., 214 N.J. Super. 148, 165 n.4 (App. Div. 1986) (“We recognize that the owner may have a loss in the sense of having competition to his SMATV system. But there is no constitutional requirement to compensate an owner for that loss.”). The Board finds this holding applies equally to circumstances, such as this case, where the presence of a competitor is the sole cause of the loss claimed. Thus, NADC’s possible decrease in revenue stream from RCN, based upon the competition with RCN’s television system, is not subject to compensation.

Accordingly, the Board HEREBY ADOPTS the ALJ's recommendation and HEREBY FINDS AND ORDERS that Comcast must provide compensation in the amount of \$1.00 for the takings imposed upon NADC by this decision.

Telephone & Internet Access:

ALJ Gural found that telephone and internet service fall outside of the scope of a petition for access under N.J.S.A. 48:5A-49 such that any arguments as to limiting or expanding the petition are irrelevant to this proceeding. Comcast agrees with this determination in that it contends that any conclusion on the petition must be silent on the issue, but argues that the granting of cable television service under N.J.S.A. 48:5A-49 includes services such as Internet and telephone, and further concedes that it will be required to satisfy any federal and State requirements covering any proposed services over the wires placed in accordance with this grant of access. NADC likewise agrees that telephone and internet access fall outside of this petition, but seeks a specific provision that Comcast may not use the wires placed under this decision for anything other than the provision of "television services." Specifically, Newport seeks to have the Board impose a condition on the grant of access precluding Comcast from offering Internet or telephone service absent a voluntary agreement between NADC and Comcast.

The Board agrees with ALJ Gural to the extent that he finds that telephone and internet service are not within the explicit scope of the pending matter. Under this Order, the Board is granting, with conditions, Comcast's access to the Newport Complex for the provision of cable television service as defined under N.J.S.A. 48:5A-3(j) (cable television service" includes the definitions of cable television reception service and cable communications service herein, as well as the provision of any other impulse or signal by a cable television company or other service lawfully provided, utilizing the facilities of the system"). Based upon this, Comcast will be authorized to provide the services encompassed by that definition to the extent that it complies with any and all other applicable requirements of State and federal law. No basis exists for a provision in this Order expressly prohibiting certain services as a condition of access, as requested by NADC, and indeed 47 U.S.C.A. § 541(b)(3)(B) appears to preclude the Board from doing so as to telecommunication services. Additionally, primary jurisdiction over internet services, while currently subject to some interpretation, appears to rest with the Federal system under the Federal Communications Commission. In re Inquiry Concerning High-Speed Access to Internet Over Cable and Other Facilities, 17 F.C.C. Rcd. 4798, 4822 (March 15, 2002) (declaring cable modem service to be an interstate information service and proposing federal rules to ensure an open and consistent regulatory framework).² In light of this regulatory framework, the requirements for internet and telephone service are not before the Board at this time, and it is thus beyond the scope of this proceeding to address and consider those requirements. Accordingly, the Board HEREBY ADOPTS the ALJ's recommendation, with modification, and HEREBY REJECTS NADC's request to condition the grant of access for the provision of cable television service.

² The appropriate classification of high speed internet access is subject to continued study and review by the Board under the legislative mandate set forth in P.L. 2003, c.38, § 7(a).

Conditions of Access:

Term:

ALJ Gural determined that the length of access to be granted by this action should consist of either “the remaining life of Comcast’s franchise if it exceeds three years or at least 5-years. The parties are free to negotiate other duration terms.” (Initial Decision, at 3.)

NADC approves of the ALJ’s implication that the term should be for a fixed period, but takes exception to the finding that three years is unreasonable while five years is reasonable. NADC believes that this finding was based upon economic evidence presented outside of the evidentiary hearings and not subject to proper cross examination.

Comcast likewise approves of the ALJ’s finding, citing the language that states that the length of access should be for the remaining life of the franchise, but takes exception to the use of five years as a proposed term and to the statement that the parties are free to negotiate other terms. Comcast notes that the purpose of this action for access is predicated upon the parties being unable to reach an agreement, and therefore believes that the only conditions that can apply to the access are those imposed by this Board. Accordingly, the term of access can not be negotiated, and should be set as coterminous with the expiration of Comcast’s Jersey City franchise.

The Board agrees with the finding of ALJ Gural, with minor modifications. The Board agrees that the proper term of access is coterminous with the length of the Comcast franchise in Jersey City, without reference to any explicit three or five year term. The Board also agrees that generally the parties are free to negotiate other duration terms in ordinary circumstances, but in this case, once access is granted by Board Order rather than through mutual agreement, the parties are no longer in a position to negotiate over terms. Thus, the Board HEREBY ADOPTS the ALJ’s recommendation, with modification, and HEREBY FINDS AND ORDERS that Comcast’s term of access to the Newport complex shall be coterminous with the current franchise term in Jersey City.

Termination Disposition of Wiring:

ALJ Gural determined that, in the event of a termination of access, Comcast would have the right to either leave its equipment in place or remove it, but that this determination should be included in a service contract covering the access grant. ALJ Gural based this finding on the language and intent of 47 C.F.R. § 76.804(d), which indicates that all service contracts between cable providers and multiple dwelling unit owners should include a provision setting forth the disposition of wiring in the event of termination. Federal law, according to ALJ Gural, required this result.

Comcast takes exception to this finding, and instead advocates that the determination of the disposition of the wiring at termination can not be made now, but must be made at the time of termination based upon the laws and regulations then in effect. According to Comcast, because the access will be granted by Board Order, and not by mutual agreement, the requirements of 47 C.F.R. § 76.804(d) do not apply, and with the possibility of termination being ten years or more off in the future, determination of the disposition of the wiring is not, in effect, ripe.

NADC takes exception to ALJ Gural's determination that Comcast has the option of retaining possession of its wiring in the event of termination. Specifically, NADC believes that "the Board should determine that NADC may require Comcast to remove its facilities, but Comcast should not have any right to remove facilities without NADC's consent." (NADC Exceptions, at 14.) NADC claims this "flexibility" is necessary to ensure for timely transfers of service in the event Comcast is no longer providing service.

The Board agrees with the findings of ALJ Gural to the extent that determination of the cable disposition in the event of termination should be controlled by 47 C.F.R. § 76.804. As noted, however, the Board will be granting access via an Order, and thus no service agreement shall exist. Instead, this Board Order will serve as the framework for Comcast's access of the Newport Complex. In the absence of a service contract, the Board must defer to the regulatory requirements set out in 47 C.F.R. § 76.804, which allows for a cable company to elect to remove, abandon or sell its wiring and other equipment. Accordingly, Comcast and NADC will, in the event of a termination, be required to conform to the obligations and options set forth in 47 C.F.R. § 76.804, as may be amended. Thus, the Board HEREBY REJECTS the ALJ's recommendation, and HEREBY FINDS AND ORDERS that Comcast and NADC shall be bound by the regulations applying to the disposition of home run wiring at the time of termination.

Environmental Hazard Insurance:

ALJ Gural found that Comcast should be required to provide NADC with an environmental hazard liability insurance policy as a condition of access. ALJ Gural specifically found the insurance to be "the kind of protection that will inure to the benefit of all parties."

NADC fully supports the ALJ's decision on this matter. Comcast takes exception to the requirement, finding that NADC failed to justify the need for environmental hazard liability insurance under the proposed circumstances of access. Comcast notes that no claim of environmental hazard has been raised, and that no previous environmental hazard has been found on the site. Comcast proposes to dig its trenches by hand to a depth of no more than eighteen inches, and indicates that on a site that has been subject to trenching to depths of 30 to 40 feet, eighteen inches should not create any problem. Thus, the environmental hazard liability insurance is unnecessary, according to Comcast.

The Board agrees with the findings of ALJ Gural that environmental hazard liability insurance is appropriate in this situation. Even assuming that the likelihood of environmental liability may be small in this case, as asserted by Comcast, the financial repercussions can be quite significant.³ As such, the Board HEREBY ACCEPTS the ALJ's recommendation, and HEREBY FINDS AND ORDERS that Comcast must acquire environmental hazard liability insurance as a condition of access.

³ In its Reply to Exceptions, NADC referenced the existence of an Agreement of Understanding and Remedial Plan between NADC and the Department of Environmental Protections. By letter dated July 29, 2003, Comcast asked for this reference to be stricken from the record as being untimely because it had not been previously raised. In a response, dated August 4, 2003, NADC argued that it was appropriate to reference the agreement in reply to Comcast's arguments, and it reiterates that the Board take "judicial notice" of the agreement. The Board notes that, while the existence of the agreement supports the conclusion reached by the Board, it did not serve as a basis for the decision, and thus we need not reach a determination as to its admissibility.

Performance Bond:

ALJ Gural determined that, based upon Comcast's financial health, no completion bond or parent bond was necessary to insure the successful build-out of the proposed facilities. Comcast agrees with this determination, while NADC takes exception. NADC believes that ALJ Gural was mistaken to predicate his belief of economic stability upon the current financial status of Comcast, because, as a wholly owned subsidiary, Comcast's financial situation could be drastically and rapidly changed by its parent corporation.

The Board agrees with ALJ Gural's determination regarding the need for a performance bond. Under N.J.S.A. 48:5A-28, when a cable operator is seeking municipal consent to build cable plant, the operator is required to post a performance bond of not less than \$25,000 to ensure the "faithful performance of all undertakings." This bond has been submitted to Jersey City in accordance with statute. Nothing in the statute, however, requires a bond for the benefit of any entity smaller than a municipality. As such, the Board HEREBY ACCEPTS the ALJ's recommendation, and HEREBY FINDS AND ORDERS that Comcast shall not be required to post a performance bond.

Second Feed:

ALJ Gural made clear in his decision that Comcast need not be required to provide a second feed line to the Newport Complex buildings as a back-up in the event a construction accident severed the primary feed cable. Comcast has offered to encase the primary feed line in red concrete and to ensure that any and all contractors are aware of the placement of the line through standard "One Call" requirements. See N.J.S.A. 48:2-73 et seq. (detailing the requirements of the New Jersey "Underground Facility Protection Act.") Additionally, ALJ Gural notes that the Board has not required Comcast to install a second feed in the Jersey City area despite identical dangers to other cable subscribers in the area. This, coupled with the assurances of Comcast that damage can be repaired in an expedited manner, was sufficient for ALJ Gural to find that a second feed line was not necessary.

NADC takes exception to this finding as it considers it a reasonable condition of access. NADC notes that the Newport section of Jersey City is currently subject to significant levels of construction, with a "very real potential for the main feed to be cut, leaving tenants without Comcast services for an extended period." (NADC Exception, at 19.) NADC also objects to the assurances provided by Comcast as to its speed and success with regard to repairs.

The Board agrees with ALJ Gural that the Newport Complex does not require a second feed line for service. The Board has not required a second line to other Comcast customers in the Newport area of Jersey City, and nothing about the provision of service to the Newport Complex is so different as to change this pattern. Comcast has made assurances that it will take steps to increase the protection of its main line, and the Board finds these assurances sufficient. Thus, the Board HEREBY ADOPTS the ALJ's recommendation and HEREBY FINDS AND ORDERS that, in light of Comcast's plan to encase the main feed line in red concrete and to identify it to construction personnel, Comcast does not need to provide a secondary feed for the Newport Complex as a condition of access.

X-Rays:

In order to install the riser cables necessary for Comcast to provide service to the residents of the Newport Complex, where space in existing vertical risers and chases cannot

otherwise accommodate Comcast's facilities, it must drill holes through the concrete slabs between floors. NADC argued during the hearings that it was aware of live electrical conduits running through the floors, but was unable to pinpoint the location of these conduits. Because of this, NADC proposed to require Comcast to x-ray the floors prior to drilling. ALJ Gural, in denying this condition of access, noted that "I find it difficult to believe that NADC is unable to pinpoint the location of the electrical conduits." (Initial Decision, at 5.) Instead, ALJ Gural found that NADC should provide Comcast with the basic location of the conduits and Comcast would then be able to use a cable locator to determine the exact location. In the event NADC was unable or unwilling to provide this information to Comcast, ALJ Gural determined that NADC should bear the expense of x-ray location.

Comcast has indicated its acceptance of this approach, and believes that the cable locator technology it possesses would, with the general input of NADC, be sufficient to ensure drilling without contact with live conduits. NADC, on the other hand, has taken exception to this conclusion by ALJ Gural. NADC notes that the "need for the xrays is caused solely by Comcast's access request. If Comcast did not seek to run its riser cable through the floors, there would be no need to incur the cost. Accordingly, Comcast is directly responsible for causing such costs." (NADC Exceptions, at 22.) Furthermore, NADC reasserts the claim that the locations of the electrical conduits is unknown and that there are no documents from the original installation. RCN, as an intervener, joins with NADC on the issue of demanding x-rays of the floors to protect against possible damage.

The Board is in agreement with ALJ Gural and does not find that the costs of x-raying the floors, if necessary, should be borne by Comcast. The Board shares ALJ Gural's difficulty believing that NADC is unable to determine the location of conduits running through its own buildings, and therefore finds that the expense associated with NADC's inability to locate these conduits should not be allocated to Comcast. As for the contention that this cost is based solely upon Comcast seeking access, and "but for" the petition, the cost would not be incurred, the Board finds this argument to be misplaced. The cost associated with the determination of the risers comes not from Comcast seeking access, but from NADC's inability to identify features of its own buildings. Thus, the Board HEREBY ADOPTS the ALJ's recommendation and HEREBY FINDS AND ORDERS that Comcast is not required to xray the floors to locate electrical conduits as a condition of access, and instead NADC shall provide Comcast with sufficient information to allow for use of the cable locator. In the event that NADC is unable to accommodate Comcast and its cable locator, the expense of x-raying the floors shall be borne by NADC.

Trash Compactor Room:

ALJ Gural determined that the proposal to place a three foot by three and a half foot by half inch thick sheet of plywood on each floor's trash compactor room for attachment of cable equipment was acceptable in those situations where the placement would fit, and should be subject to having alternatives in those locations where the placement would not work. Both NADC and Comcast have agreed to place the board in those trash compactor rooms that can safely accommodate the equipment and to address those locations where the proposed placement is unfeasible on a room-by-room basis. The Board HEREBY ADOPTS the ALJ's recommendation and HEREBY FINDS AND ORDERS that Comcast shall install the plywood boards in those trash compactor rooms that can safely accommodate the placement and that Comcast and NADC shall work out all other placements on a room-by-room basis. The Board further ORDERS that, in any instance where NADC and Comcast are unable to reach a mutual

agreement, a neutral third party, selected by NADC and Comcast, shall be employed to resolve the issue, with the cost for such arbitration borne equally by NADC and Comcast.

Wiring Chases and Moldings:

A number of the Newport Complex buildings have wiring chases which consist of square conduits ranging from 5" x 10" to 9 ½" x 10". These conduits currently carry telephone cable, sprinkler lines and RCN's cables, and, according to NADC's witness, are in some cases full or blocked. ALJ Gural noted that the parties have agreed to "determine the most efficient use of remaining chase space for each floor of each building and where blocked or not feasible, to work with each other to develop acceptable alternative plans." (Initial Decision, at 6.) In those situations where the wiring chases are not feasible, ALJ Gural found that the Comcast cable installation should be run above the "sheetrock ceilings" or run through wire molding attached to the corner between ceiling and wall. This wire molding is to be of a color and style that matches any color in the hallways or apartments so as to be as unobtrusive as possible.

NADC, while accepting the concept of determining the viability of using the wiring chases on a floor-by-floor basis, takes exception to the use of any wire molding except in cases where any and all alternatives have been exhausted. For example, cites NADC, Comcast should be required to build a supplemental wiring chase between the existing chase and the ceiling before being allowed to use the wire molding. (NADC Exceptions, at 24-25.) Likewise, NADC agrees with the ALJ and reaffirms its belief that Comcast should be required to install cable above the sheetrock ceilings wherever possible prior to being allowed to install wire molding.

Comcast likewise accepts the use of the existing conduits where feasible, and believes that wire molding should be used in all other situations. Comcast notes, however, that the basis for ALJ Gural's determination that the cable wires can be run over the sheetrock ceilings in some of the buildings may be based upon a misunderstanding. Comcast asserts that its witness testified under a mistaken notion that the ceilings were drop ceilings, not solid sheetrock, and that the witness' understanding can be seen in the statement about the newer buildings. The witness noted that: "In the light fixtures, drop down, we're able to get up in there and run our wiring through those openings. We wouldn't need to cut any holes -- -- in the Sheetrock." (Rooney Transcript, at 37:10-15.) Thus, asserting that the ceilings are solid sheetrock, Comcast only takes exception to the ALJ's decision to require placement of the cable installation above the sheetrock ceilings in the newer buildings.

The Board is substantially in agreement with the decision of ALJ Gural. The Board agrees that the wiring chases should be used whenever feasible and that the parties should attempt to find common ground in those situations where the wiring chases are blocked or otherwise unusable. The Board also approves of the use of wire molding in those cases where other methods do not work. The Board does not agree, however, that Comcast should be required to build additional wiring chases before it may install the wire molding. Similarly, the Board accepts the argument of Comcast that the requirement to install cable above the sheetrock ceilings in the newer buildings was predicated upon a mistaken belief that the sheetrock would not need to be cut for the access to occur. Therefore, the Board HEREBY ADOPTS the ALJ's recommendation, with modification, and HEREBY FINDS AND ORDERS that NADC shall allow Comcast to place cable in the existing wiring chases where feasible, above ceilings that do not require the cutting of sheetrock where possible, and in wire moldings of a color and style selected by NADC in those situations where neither other option is available.

Compensation for Damages and Costs:

ALJ Gural directed Comcast to compensate NADC for any damage caused by the installation work and to compensate NADC and RCN for the cost of employees to monitor the construction of Comcast facilities. This requirement was predicated upon successful showings by NADC under N.J.A.C. 14:18-4.5(d)(4-5).

NADC agrees with ALJ Gural to the extent that the above items are specifically included, but takes exception to the implicit exclusion of any number of items which are not listed, including items such as the costs of updating drawings, tenant notifications, repair costs, and "costs of proceeding in this [access] proceeding to ensure appropriate conditions for installation." (NADC Exceptions, at 37.) Comcast does not contest the requirements set forth by the ALJ, but does not consent to the above items.

The Board is in agreement with the decision of ALJ Gural on this topic. Under N.J.A.C. 14:18-4.5(d)(4-5), NADC had the burden of proof to show those out of pocket and extraordinary costs associated with the installation for which Comcast was required to compensate NADC. Based upon the evidence provided and the testimony taken before ALJ Gural, the only costs on which NADC satisfied its burden were the security costs and the compensation for damage. Accordingly, NADC is not able to recover these additional expenses under N.J.A.C. 14:18-4.5(d)(4-5). Thus, the Board HEREBY ADOPTS the ALJ's recommendation and HEREBY FINDS AND ORDERS that Comcast, under the provisions of N.J.S.A. 48:5A-49, must compensate NADC for any damage caused by the installation, operation and removal of the cable system, and must compensate NADC and RCN for the cost of employees to monitor the construction of the Comcast facilities.⁴

Approval of Trenching, Wiring and Other Plans:

The ALJ noted that, because Comcast has agreed to seek NADC's approval of the design diagrams, construction plans and trench work schedule prior to access, any complaint in this regard by NADC is premature. Comcast agrees and has indicated that it will seek NADC's approval, provided that NADC does not unreasonably withhold its approval. NADC agrees that Comcast must provide the plans and schedules prior to construction. RCN insists that access must not be granted until Comcast has provided schedules and plans, and these have been approved.

The Board agrees with the decision of ALJ Gural on this element. NADC has the right to approve building plans and schedules, provided that the approval is not unreasonably withheld. Thus, the Board HEREBY ADOPTS the ALJ's recommendation, with minor modifications, and HEREBY FINDS AND ORDERS that Comcast must submit its design diagrams, construction plans and trench work schedule, prior to beginning construction, to NADC for approval, with the explicit understanding that NADC shall not unreasonably withhold such approval. The OCTV shall receive copies of all submissions, diagrams and approvals. Comcast shall submit these documents no later than fifteen (15) days from the date of this Order, and NADC shall review and approve the documents no later than thirty (30) days following receipt from Comcast. The Board further ORDERS that, in any instance where NADC and Comcast are unable to reach a

⁴ Additionally, and as required by statute, Comcast is required to compensate NADC for any liability which might arise in the future out of the installation, operation or removal, subject to the proof requirements set forth in N.J.A.C. 14:18-4.5.

mutual agreement, a neutral third party, selected by NADC and Comcast, shall be employed to resolve the issue, with the costs for such third party borne equally by NADC and Comcast.

Summary of Findings:

The following is a summary of the Board directives contained herein:

1. The Board GRANTS, nunc pro tunc, Comcast's request to extend the due date of the reply exceptions from July 17, 2003 to July 24, 2003.
2. The Board ADOPTS the ALJ's recommendation and HEREBY ORDERS Comcast to access and provide cable television service to the Newport Complex, controlled by NADC, subject to the reasonable conditions presented herein.
3. The Board ADOPTS the ALJ's recommendation and HEREBY ORDERS Comcast to provide compensation to NADC in the amount of \$1.00 for the takings imposed by this decision.
4. The Board ADOPTS the ALJ's recommendation, with modification, and HEREBY REJECTS NADC's request to condition the grant of access for the provision of cable television service.
5. The Board ADOPTS the ALJ's recommendation, with modification, and HEREBY ORDERS that Comcast's term of access to the Newport complex shall be coterminous with the current franchise term in Jersey City.
6. The Board REJECTS the ALJ's recommendation, and HEREBY ORDERS that Comcast and NADC, in the event of a termination of access, shall be bound by the then-existing rules and regulations as they relate to the disposition of home run wiring.
7. The Board ADOPTS the ALJ's recommendation, and HEREBY ORDERS that Comcast must acquire environmental hazard liability insurance.
8. The Board ACCEPTS the ALJ's recommendation, and HEREBY ORDERS that Comcast shall not be required to post a performance bond.
9. The Board ADOPTS the ALJ's recommendation, and HEREBY ORDERS that Comcast does not need to provide a secondary feed for the Newport Complex as a condition of access provided that Comcast takes the steps outlined to ensure the safety of the line during construction.
10. The Board ADOPTS the ALJ's recommendation, and HEREBY ORDERS that NADC shall provide Comcast with sufficient information to allow for use of the cable locator, and that in the event that NADC is unable to accommodate Comcast and its cable locator, the expense of x-raying the floors shall be borne by NADC.
11. The Board ADOPTS the ALJ's recommendation, and HEREBY ORDERS that Comcast may install plywood boards in those trash compactor rooms that can safely accommodate the placement, and that Comcast and NADC shall work out all other placements on a room-by-room basis.

12. The Board ADOPTS the ALJ's recommendation, with modification, and HEREBY ORDERS that NADC shall allow Comcast to place cable in the existing wiring chases where feasible, above ceilings that do not require the cutting of sheetrock where possible, and in wire moldings of a color and style selected by NADC in those situations where neither other option is available.
13. The Board ADOPTS the ALJ's recommendation, and HEREBY ORDERS that Comcast must compensate NADC for any damage caused by the installation and must compensate NADC and RCN for the cost of employees to monitor the construction of the Comcast facilities.
14. The Board ADOPTS the ALJ's recommendation, and HEREBY ORDERS that Comcast must submit its design diagrams, construction plans and trench work schedule to NADC for approval, which shall not be unreasonably withhold by NADC. The OCTV shall receive copies of all submissions and approvals, and Comcast shall submit these documents no later than fifteen (15) days from the date of this Order, with NADC reviewing and approving the documents no later than thirty (30) days following receipt from Comcast.

Based upon the foregoing, the Board HEREBY ADOPTS IN PART, MODIFIES IN PART, AND REJECTS IN PART the ALJ's Initial Decision as set forth herein. The Board likewise HEREBY ORDERS that all parties shall provide ongoing documentation to the Board as each provision is satisfied.

DATED: August 7, 2003

BOARD OF PUBLIC UTILITIES
BY:

SIGNED

JEANNE M. FOX
PRESIDENT

SIGNED

FREDERICK F. BUTLER
COMMISSIONER

SIGNED

CAROL J. MURPHY
COMMISSIONER

SIGNED

CONNIE O. HUGHES
COMMISSIONER

SIGNED

JACK ALTER
COMMISSIONER

ATTEST:

SIGNED

KRISTI IZZO

SECRETARY

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